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No. _____

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In The
Supreme Court of the United States

BRIAN SHANNON,

Petitioner,

v.

ANTHONY NEWLAND, Warden,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

DENNIS P. RIORDAN
DONALD M. HORGAN
Counsel of Record
523 Octavia Street
San Francisco, CA 94102
Telephone: (415) 431-3472

Counsel for Petitioner
Brian Shannon

QUESTIONS PRESENTED

1. IS A FEDERAL PETITION FOR A WRIT OF HABEAS CORPUS TIMELY UNDER 28 U.S.C. SECTION 2244(d)(1)(D) AND THIS COURT'S DECISION IN *UNITED STATES V. JOHNSON* WHEN IT IS FILED IN FEDERAL COURT WITHIN A YEAR OF THE DATE THAT A STATE COURT DECISION SUPPLIES THE NECESSARY FACTUAL PREDICATE FOR THE PETITION'S FEDERAL CONSTITUTIONAL CLAIM?
2. IS A FEDERAL PETITION FOR A WRIT OF HABEAS CORPUS TIMELY UNDER 28 U.S.C. SECTION 2244(d)(1)(B) AND THIS COURT'S DECISION IN *LACKAWANNA COUNTY DISTRICT ATTORNEY V. COSS* WHEN IT IS FILED IN FEDERAL COURT WITHIN A YEAR OF THE DATE THAT A STATE COURT DECISION REMOVES THE IMPEDIMENT TO FILING CREATED BY PREVIOUS STATE ACTION?

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The public opinion of the Ninth Circuit Court of Appeals affirming the judgment of the district court is reported at *Shannon v. Newland*, 410 F.3d 1083 (9th Cir. 2005) and appears at App. 1-14.

The district court's order and opinion denying Shannon's federal petition for a writ of habeas corpus is unreported and appears at App. 15-29.

The state Court of Appeal's opinion affirming Shannon's conviction is likewise unreported and appears at App. 30-36.

JURISDICTION

On June 8, 2005, the United States Court of Appeals for the Ninth Circuit entered its judgment affirming the district court's denial of Shannon's petition for a writ of habeas corpus, brought under 28 U.S.C. § 2254. (App. 1-14) On August 23, 2005, the Ninth Circuit entered an order denying Shannon's timely petition for rehearing en banc. (App. 39)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2244 provides, in relevant part:

...

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.



INTRODUCTORY STATEMENT

Rule 10(c) of the Rules of the Supreme Court identifies the following as a compelling reason for this Court to review a decision of a United States court of appeals on certiorari:

When . . . a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Id.; see also *Schlude v. Commissioner*, 372 U.S. 128, 130 (1968) (Certiorari granted where court of appeals has misapplied or misconstrued relevant Supreme Court precedent).

The Ninth Circuit Court of Appeal's decision implicates the criteria set forth in Rule 10(c) because it contravenes clearly established precedent of this Court. Specifically, Shannon was convicted in a California trial court of second degree murder in 1994. He challenged that court's homicide instructions on direct appeal but the judgment was affirmed in 1996. In June, 2000, a ruling by the California Supreme Court, made retroactive by the state courts of appeal, permitted Shannon, for the first time, to state a cognizable and compelling federal constitutional challenge to the trial court's homicide instructions. See *People v. Lasko*, 23 Cal.4th 101 (2000).

After exhausting that challenge in the state courts, Shannon sought habeas relief in the federal district court. That court ruled that the petition was untimely because it had not been filed within a year of any of the available dates that commence the AEDPA limitations period under

28 U.S.C. § 2244(d), including the date that the factual predicate for the claim first arose. See section 2244(d)(1)(D).

In affirming the district court's ruling, the Ninth Circuit's opinion conflicts with this Court's decision in *United States v. Johnson*, __ U.S. __, 125 S.Ct. 1571 (2005), which held that a state court ruling marking the date that a federal constitutional claim arises constitutes the "factual predicate" for a motion to vacate a conviction or sentence under 28 U.S.C. § 2255. Because the "factual predicate" for commencing the one-year limitations period is defined identically in the context of a petition for habeas relief under section 2254, and because Shannon diligently filed his federal petition within a year of the date that the factual predicate for his claim arose in this matter, his petition was timely under *Johnson* and should have been considered on the merits.

The panel's untimeliness ruling was gravely flawed in another critical respect. Although the state Supreme Court's June, 2000 instructional ruling in *Lasko* represented an unequivocal reversal of the position taken by that same court when it denied review in Shannon's earlier direct appeal, the Ninth Circuit declined to construe the June, 2000, ruling as the removal of an impediment to the filing of his federal habeas action within the meaning of 28 U.S.C. § 2244(d)(1)(B). The failure to so apply that provision is irreconcilable with both the governing statutory language and with this Court's decision in *Lackawanna County Dist. Atty. v. Coss*, 532 U.S. 394 (2001), which recognized that state action involving a failure to recognize a federal constitutional claim may constitute an impediment to filing a federal habeas application, the removal of which likewise commences the one-year limitations period applicable to federal habeas petitions.

The implications of the panel's erroneous rulings on both of these issues will have profound implications for many of the habeas applications routinely presented to the federal courts. This petition should accordingly be granted.

STATEMENT OF THE CASE

A. Introduction

The history of this case leaves no doubt as to the presence of four key facts and/or conclusions of law: first, Shannon has alleged a valid federal constitutional challenge to his state murder conviction; second, he has diligently pursued that challenge at every available opportunity in the state and federal courts; third, the inaction and error of the California courts precluded Shannon from asserting his federal constitutional claim until the time of a state supreme court ruling in June, 2000; and, finally, if the state supreme court's 2000 ruling is deemed the triggering date for the one-year limitations period under 28 U.S.C. § 2244(d)(1)(B) or (D), then Shannon's federal habeas petition was timely filed.

B. State Court Proceedings and the Genesis of Petitioner's Federal Constitutional Claim

On December 12, 1994, after more than two full days of deliberations, a jury in San Mateo County, California, convicted petitioner Shannon of the second degree murder verdict of his girlfriend, Kimberly Stack. (CT 123)¹ On

¹ "CT" refers to the Clerk's Transcript in the state court appeal; "RT" to the Reporter's Transcript in that appeal; "Dkt." to the relevant
(Continued on following page)